

**FILED**

**MAY 12 2006**

**CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

DAVID OSHER; MATT BRODY,

Plaintiffs,

and

MARCO CARNEVALE; ANDREW  
TARCIA; WESTLAND POLICE &  
FIRE RETIREMENT SYSTEM, On  
Behalf of Themselves and All Others  
Similarly Situated,

Plaintiffs-Appellants,

v.

JNI CORPORATION; TERRY  
FLANAGAN; GLORIA PURDY;  
THOMAS K. GREGORY; CHARLES  
MCKNETT; ERIC P. WENAAS;  
JOHN STISKA,

Defendants-Appellees.

No. 04-55625

D.C. No. CV 01-0557-J (BLM)

MEMORANDUM\*

Appeal from the United States District Court  
for the Southern District of California  
Napolean Jones, Jr., District Judge, Presiding

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\* This disposition is not appropriate for publication and may not be cited by  
or to the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Argued and Submitted December 7, 2005  
Pasadena, California

Before: REINHARDT and RAWLINSON, Circuit Judges, and FOGEL,  
District Judge\*\*

Plaintiffs appeal the district court's dismissal of their third amended complaint without leave to amend and with prejudice for failure to state a claim upon which relief may be granted. Plaintiffs, who purport to represent all persons who purchased common stock in JNI Corporation ("JNI") between July 13, 2000 and March 28, 2001, allege that JNI and six of its officers and directors (collectively, "Defendants") made false or misleading statements to the market in violation of § 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 promulgated thereunder. Plaintiffs also allege that three JNI officers and directors are liable under § 20(a) of the Exchange Act as controlling persons of JNI.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review *de novo* the district court's dismissal of the third amended complaint, *see Gompper v. VISX, Inc.*, 298 F.3d 893, 895 (9th Cir. 2002), and we review for abuse of discretion the district court's denial of leave to amend, *see In re Vantive Corp. Sec. Litig.*, 283

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\*\* The Honorable Jeremy Fogel, United States District Judge for the Northern District of California, sitting by designation.

F.3d 1079, 1097 (9th Cir. 2002).

The district court concluded that Plaintiffs' § 10(b) claim failed to meet the heightened pleading requirements of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub.L. No. 104-67 (1995), and that Plaintiffs' § 20(a) claim could not survive absent a viable claim for primary liability. We agree with the district court's careful and well-reasoned decision on these points, and therefore affirm the dismissal of the third amended complaint.

The district court's denial of leave to amend presents a more difficult question. Leave to amend is to be granted with extreme liberality in securities fraud cases, because the heightened pleading requirements imposed by the PSLRA are so difficult to meet. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). The United States Supreme Court has articulated the applicable standard as follows:

In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be “freely given.”

*Foman v. Davis*, 371 U.S. 178, 182 (1962). A district court's failure to consider the *Foman* factors and articulate why it has decided to deny leave to amend may

constitute an abuse of discretion in and of itself. *Eminence*, 316 F.3d at 1052. Ultimately, “[d]ismissal with prejudice and without leave to amend is not appropriate unless it is clear on *de novo* review that the complaint could not be saved by amendment.” *Id.*

In the instant case, the district court issued detailed orders dismissing Plaintiffs’ first and second amended complaints with leave to amend. It then dismissed Plaintiffs’ third amended complaint without leave to amend after concluding that Plaintiffs had failed to cure the specified pleading deficiencies. However, the district court did not discuss any of the *Foman* factors when it did so, stating only the following with respect to whether Plaintiffs should be granted leave to amend:

In its previous Order, the court cautioned Plaintiffs that they would receive no further opportunities to amend their pleadings. Accordingly, the TACC is DISMISSED WITH PREJUDICE.

Plaintiffs represent that they could amend their pleading to address at least some of the deficiencies noted by the district court. Because the district court did not make a finding under *Foman*, we vacate the judgment. On remand, the district court may permit Plaintiffs once again to amend their complaint or it may state with particularity its reasons for declining to do so.

The parties shall bear their own costs on appeal.

AFFIRMED in part, VACATED in part, and REMANDED.